

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

JETSETTER EXPRESS, INC.

Employer
and

Case No. 31-RC-8475

TEAMSTERS LOCAL 87, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Jetsetter Express Inc., is engaged in the package and delivery business. The Petitioner, Teamsters Local 87, filed a petition under Section 9(c) of the National Labor Relations Act seeking to represent a unit of drivers and dock workers employed by the Employer at its facility in Bakersfield California. The Employer asserts that it would be inappropriate to direct an election in this matter because the Employer will be closing its operation in Bakersfield. For the reasons described below, I find that it is appropriate to direct an election in this matter.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

I. PROCEDURAL MATTERS

A. POST-HEARING STIPULATION

I take administrative notice of the Post-Hearing Stipulation, which the parties stipulated should be part of the record in this matter.

B. HEARING OFFICER RULINGS

The Employer offered into evidence a declaration of its President, Mark Runia. In doing so, the Employer's attorney stated that Mr. Runia was unable to testify because he was out of state. The Union objected to the admission of the declaration because the

declaration had not been properly authenticated and because it was hearsay. Nevertheless, the Hearing Officer accepted the declaration into evidence. Pursuant to Section 102.65(c) of the Board's Rules and Regulations, there is an automatic exception to this ruling.

The declaration of Mark Runia purports to authenticate a letter he received from DHL, which is a notice of non-renewal of the Employer's Cartage Agreement with DHL. In addition, the declaration states that the Employer performs no work at its Bakersfield California facility other than the work performed pursuant to the Cartage Agreement with DHL and states that Mr. Runia has "resolved" that the Employer will cease doing business at the Bakersfield facility effective April 24, 2005 as a result of that letter. Thus, the matters encompassed by the declaration go to the crux of the issue to be decided in this case.

I recognize that the Board avoids being overly technical in applying the Federal Rules of Evidence, especially in pre-hearing representation proceedings, which are considered to be investigatory and not adversary.^{1/} However, the Board's Rules and Regulations specifically provide that parties to representation proceedings have the right to cross-examine witnesses.^{2/} Since the declaration of Mark Runia relates to the core issue in this matter, I find that the Hearing Officer erred in admitting the declaration into evidence, thereby denying the Petitioner the opportunity to cross examine the declarant on the crucial aspects of the statement.^{3/} In addition, I do not find that the proffered reasons for Runia's unavailability to testify sufficiently outweigh the valid hearsay objection to the declaration. See, *Teamsters Local 812 (Sound Distributing)*, 307 NLRB

1/ Section 102.66(a) of the Board's Rules and Regulations states with respect to these proceedings that "[t]he rules of evidence prevailing in courts of law or equity shall not be controlling."

2/ Section 102.66(a) of the Board's Rules and Regulations provides that "Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have the power to call, examine, and cross-examine witnesses..." See, *Mid-Con Cables*, 256 NLRB 720 (1981), in which the Board remanded a case where the Hearing Officer had denied a party an opportunity to cross-examine a witness at a pre-election representation hearing.

3/ For example, the Petitioner should have an opportunity to cross examine Mr. Runia about facts relating to the circumstances of the letter of non-renewal, about his resolution to cease doing business at the Bakersfield facility, and about any steps taken to implement the resolution to cease doing business.

1267 at fn. 3 (1992). Accordingly, I reverse the Hearing Officer's admission of Employer's Exhibit 1 into evidence.^{4/}

I find that other rulings by the Hearing Officer are free from prejudicial error and are hereby affirmed.

II. JURISDICTION

The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.^{5/}

III. LABOR ORGANIZATION

The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

IV. QUESTION CONCERNING COMMERCE

A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer asserts that it would not be appropriate to direct an election in this case because the Employer will be closing its operation in Bakersfield. The Board will not conduct an election when a permanent layoff is imminent and certain. *Hughes Aircraft*, 308 NLRB 82 (1992). For the reasons discussed above in Section I B (Hearing Officer Rulings), I reversed the Hearing Officer and rejected the declaration of the Employer's President, which the Employer had offered into evidence. The Employer offered no other evidence whatsoever in support of its assertion that it will be ceasing its operation at the Bakersfield facility in the near future; nor did it introduce any evidence

^{4/} Employer's Exhibit 1 will now be considered to be in a Rejected Exhibit File.

^{5/} The Employer, Jetsetter Express, Inc., is a Utah corporation, with a principal place of business located in Draper, Utah. The Employer has a facility in Bakersfield California, where it is engaged in the business of package and delivery. During the past 12 months, a representative period, the Employer purchased and received goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of California. Thus, the Employer satisfies the statutory jurisdictional requirement as well as the Board's discretionary standard for asserting jurisdiction herein. *Siemons Mailing Service*, 122 NLRB 81 (1958).

that it would be permanently laying off its employees at that facility. Therefore, I find that the record fails to establish that there will be a definite and imminent cessation of the Employer's operation at the Bakersfield facility.

Even if Runia's declaration had not been rejected from evidence, it would not have affected the outcome of this matter. The Board is reluctant to place much weight upon evidence contained in declarations of witnesses who are not available to testify.^{6/} Even if I had affirmed the admission of the declaration into evidence, I would not afford it significant weight. Since the declaration provides virtually no context for the letter of non-renewal, and since it fails to establish that the Employer has taken any steps to implement Runia's resolve to cease doing business at the Bakersfield facility, I find that the declaration fails to establish a definite and imminent cessation of the Employer's operations at the Bakersfield facility.^{7/}

^{6/} See, *Industrial Waste Service, Inc.*, 268 NLRB 1180 at fn.1 (1984) (in which the Board found that although the Administrative Law Judge erred in not admitting into evidence the affidavit of a former employee who had died before the hearing, the Board would place no weight on the affidavit because "such an affidavit 'must be evaluated with maximum caution, and only be relied upon if and when consistent with extraneous, objective and unquestionable fact. (citation omitted)'"). See also, *Teamsters Local 812 (Sound Distributing)*, 307 NLRB 1267 (1992) (in which the Board affirmed the decision of an Administrative Law Judge who had noted that he doubted the affidavit of a witness given to a Board Agent in the course of an investigation "should have been received, or if received, given any weight." In this regard, the ALJ noted that in the absence of any opportunity for the Respondent to cross examine the witness and absent a showing that the witness was deceased, he did not think that the witness' "unavailability for unknown reasons, sufficiently outweighs the hearsay objection to his affidavit..."); *P.I.E. Nationwide*, 282 NLRB 1060 (1987) (in which the Board affirmed the rulings of an Administrative Law Judge who had noted that although he had received into evidence the affidavit of a deceased person, according to Board policy, "such statements must be 'carefully evaluated. Self-serving statements by the declarant would not suffice as a basis for findings or inferences unless corroborated by other evidence, whereas admissions or statements against interest would not be so circumscribed. (citation omitted)'")

Although these cases arose in the context of unfair labor practice proceedings, I consider them to be relevant because the parties in representation proceedings have the right to cross examine witnesses and the matters discussed in the Runia's declaration go to the heart of the matter at issue.

^{7/} I note that if the circumstances change and the Employer does in fact take definitive action to cease its operations, the Employer can file a Motion for Reconsideration supported by a proper showing of evidence. See, Section 102.65(e)(1) of the Board's Rules and Regulations.

V. APPROPRIATE UNIT:

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act^{8/}:

INCLUDED: All full-time and regular part-time delivery drivers and dockworkers employed by the Employer at 1000 Norris Road, Bakersfield California.

EXCLUDED: All managers, office clericals, guards and supervisors as defined in the Act.

There are approximately 15 employees in the unit.

DIRECTION OF ELECTION^{9/}

I shall conduct an election by secret ballot among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations.

ELIGIBLE TO VOTE: Those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, are eligible to vote. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such a strike, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls.

^{8/} The parties have stipulated that the unit is appropriate for the purposes of collective bargaining.

^{9/} In accordance with Section 102.67 of the Board's Rules and Regulations all parties are specifically advised that I will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

INELIGIBLE TO VOTE: Employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that commenced more than 12 months before the election date and who have been permanently replaced are ineligible to vote.

Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the *TEAMSTERS LOCAL 87, AFL-CIO*.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the FULL names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director of Region 31 within 7 days of the date of the Decision and Direction of Election. The list must be of sufficiently large type to be clearly legible. This list may initially be used by the Regional Director to assist in determining an adequate showing of interest. The Regional Director shall, in turn, make the list available to all parties to the election only after she has determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, Region 31, 11150 W. Olympic Blvd., Los Angeles, California 90064 on or before, March

15, 2005. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

RIGHT TO REQUEST REVIEW

A request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, under the provisions of Section 102.67 of the Board's Rules and Regulations. This request must be received by the Board in Washington by March 22, 2005.^{10/}

DATED at Los Angeles, California this March 8, 2005.

James J. McDermott, Regional Director
National Labor Relations Board
Region 31

^{10/} See <http://gpea.NLRB.gov> for e-filing requirements.